

Bayview v Zelyakovsky
2019 NY Slip Op 30194(U)
January 16, 2019
Supreme Court, Kings County
Docket Number: 502041/14
Judge: Noach Dear
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At an IAS Term, Part FRP-1, of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 16th day of January 2019.

PRESENT:

HON. NOACH DEAR,

J.S.C.

Index No.: 502041/14

MS 2, 3, 4, 5

_____ x
BAYVIEW

Plaintiff,

DECISION AND ORDER

-against-

GREGORY ZELYAKOVSKY et al

Defendant,
_____ x

Recitation, as required by CPLR §2219 (a), of the papers considered in the review of this

Motion:

Papers	Numbered
Motion (MS 4)	<u>1</u>
Opposition/Cross (MS 5)	<u>2</u>
Reply/Opp to Cross	<u>3</u>
Cross-Reply	<u>4</u>
MS 2	<u>5</u>
Opp/Cross (MS 3)	<u>6</u>
Reply/Opp to Cross	<u>7</u>
Cross-Reply	<u>8</u>

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Upon the foregoing cited papers, the Decision/Order on this Motion is as follows:

By order dated 1/8/18, this Court restored the action (as requested in MS2) and granted Defendants' cross-motion (MS 3) to the extent of setting the matter down for a traverse hearing. The remainder of both of those motions was held in abeyance pending the outcome of the traverse hearing. Following hearing, Special Referee Derefim Neckles issued a report recommending that the Court find that service was validly effectuated against the Zelyakovsky Defendants. Plaintiff moves to confirm the referee's report (MS 4) and Defendants cross-move for its rejection (MS 5).

In rendering her decision, Referee Neckles found 1) that the process server credibly

established that he served Gregory Zelyakovsky (both personally and on behalf of Dora Zelyakovsky) and that the mailing necessary to complete service upon Dora was done pursuant to a standard office procedure for doing so; 2) that Gregory and non-party witness Hyo lacked credibility; 3) that the description of the individual served closely matched Gregory's actual appearance; and 4) that it was undisputed that Gregory signed the process server's work ticket indicating that he received process on behalf of himself and his wife.

Defendants raise several bases for rejecting the referee's findings. It is undisputed that the Clerk's office scanned the referee's recommendation without appending the transcript and exhibits considered. While that may be so, Referee Neckles provided the Court with a copy of the transcript along with her report. Her report also details the testimony that was considered. Plaintiff has provided copies of all but one of the exhibits accepted into evidence by Referee Neckles. (It is unclear why Exhibit 7 was not provided. Its omission, however, in no way prevented the parties from advancing their arguments – none of which are directed to it – and does not prevent the Court from considering whether the referee's findings are supported by the record.)

Defendants also advance an argument that was not raised in their prior motion papers – that Plaintiff failed to prove the mailing portion of service upon Dora. In support, Defendants note that the affidavit of service reflects that the process server (Anthony Schultz) did the mailing. However, Mr. Schultz testified that it was actually done (and, according to him, is always done on behalf of his company) by his wife Murial Schultz. Referee Neckles found that the Mr. Schultz's testimony was sufficient to demonstrate a standard mailing practice of the business and that it was followed here. Despite the inaccuracy on the affidavit of service, the Court agrees. The Court further notes that the copy appended to the cross-motion as Exhibit 2 includes a post office stamped certificate of mailing reflecting that the mailing was actually done.

Finally, Defendants take issue with the referee's credibility determinations, noting that Schultz has more of an interest in the outcome of the hearing than Hyo does. That is true. However, Referee Neckles was present at the hearing – unlike this Court – and was able to assess the witness' credibility (and, as relevant to Gregory, appearance) in rendering her determination. The record is consistent with her findings. While Gregory swears that he was not personally served, he also swore in his affidavit that he was 5'10 and looked significantly different than the person allegedly served – but admitted at the hearing that he is about 5'7 (offering the excuse that he used to be taller when he was

younger) and other than as to his weight no attempt was made to differentiate his appearance (in fact, Plaintiff's counsel stated for the record without rebuttal that Defendant was bald, about the correct height, etc.). Both Gregory and Hyo were unable to testify or offer an evidence that he was at the dojo on the night of service, other than that he was regularly there on Monday nights. Schultz, on the other hand, testified with specificity about the service, his procedures for creating records, the contents of those records, and that those records included proof that Schultz was actually at the service location and that Gregory signed the work ticket.

All in all, the referee's conclusions are supported by the record and the Court adopts them, finding that service was validly effectuated on Defendants Gregory and Dora Zelyakovsky.

Turning to the prior motions, the Court previously granted MS 2 to the extent of restoring the case to active status (but did not address Plaintiff's requests for JFS and other miscellaneous relief) and MS 3 to the extent of setting the matter down for a traverse (but did not address Defendants' condition precedent and 3012[d] arguments).

"A defendant seeking to vacate a default in answering a complaint and to compel the plaintiff to accept an untimely answer as timely must show both a reasonable excuse for the default and the existence of a potentially meritorious defense" (*Chase Home Fin., LLC v. Minott*, 115 A.D.3d 634 [2d Dept 2014]). As Defendants' sole proffered excuse for failing to answer was their claim that they were not properly served – which has been rejected following hearing and briefing – the Court declines to grant leave to file a late answer.

As Defendants are in default, they cannot raise Plaintiff's standing (*Wells Fargo Bank Minnesota, Nat. Ass'n v. Mastropaolo*, 42 A.D.3d 239, 244 [2d Dept 2007]) and alleged failure to comply with RPAPL 1304 (see *U.S. Bank Nat. Ass'n v. Carey*, 137 A.D.3d 894 [2d Dept 2016]; *PHH Mortg. Corp. v. Celestin*, 130 A.D.3d 703 [2d Dept 2015]) and the mortgage default notice requirements (*Deutsche Bank Nat. Trust Co. v. Patrick*, 136 A.D.3d 970 [2d Dept 2016]); *First Northern Mortgage Corp. v. Yatrakis*, 154 A.D.2d 433 [2d Dept 1989]).

Noteworthy has demonstrated its entitlement to be substituted as Plaintiff in place of Bayview.

JFS is denied. The escrow portion of the referee's report appears to be based on the Goldstein Aff which notes that portions were advanced by prior servicers and offers neither evidence that the outlays occurred nor foundation for the (unproduced) records leading him to say that they were. In addition there is a marked lack of detail, particularly as to the \$94k+ charge for "Negative Escrow."

Plaintiff's request to order that a successive notice of pendency be filed nunc pro tunc to July 1, 2017 is also denied. While Plaintiff can certainly file a new notice of pendency, it would defeat its purpose if given retroactive effect.

MS 2 granted to the extent that the case was already restored and to the extent that Noteworthy Foreclosure LLC is substituted as Plaintiff, MS 3 is, to the extent not granted by the prior order setting the matter down for a hearing, denied. MS 4 is granted. MS 5 is denied.

ENTER:



Hon. Noach Dear, J.S.C.

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